IN THE UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JAMES SELIGH	:	NO. 03-750

MEMORANDUM AND ORDER

McLaughlin, J. June 29, 2005

James Seligh was convicted on January 23, 2004, of all charges in an 18-count indictment alleging an odometer rollback scheme. He was convicted of nine counts of transporting falsely made, forged, altered, and counterfeit securities in interstate commerce in violation of 18 U.S.C. § 2314 and nine counts of providing false odometer disclosure statements in violation of 49 U.S.C. §§ 32705(a) and 32709(b). The Court sentenced Mr. Seligh on April 21, 2004, to a term of 51 months incarceration, three years supervised release, restitution in the amount of $140,000, and a special assessment of $1,800. The defendant did not appeal his conviction or sentence.

The defendant has filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, and correct the sentence. The petition was filed on behalf of Mr. Seligh by Michael E. Houghton, Executive Director of Federal Inmate Advocates. At the evidentiary hearing that was held on March 24, 2005, the petitioner was represented by counsel. The petitioner complains

that his sentence was constitutionally infirm because the Court determined his guideline level based on facts that were neither submitted to a jury and found to be true beyond a reasonable doubt, nor admitted by Mr. Seligh at any time during the proceedings. The petitioner also claims that his counsel, Brian M. Barke, Esquire and James X. Maxwell, Esquire, provided ineffective assistance in violation of the Constitution.

The petitioner's argument about his sentence relied initially on Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531 (2004) and thereafter on United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005). The petitioner's argument about his sentence is not viable in light of Lloyd v. United States, 407 F.3d 608, 615-16 (3d Cir. 2005) that held that "Booker does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date Booker issued." Because the judgment in this case was final on April 21, 2004, Booker is not applicable. The Court discusses below the claim that Mr. Seligh received ineffective assistance of counsel.

I. Findings of Fact

At the evidentiary hearing held on the petition, Mr. Seligh testified and the government presented the testimony of Messrs. Barke and Maxwell. The Court's findings of fact are

taken from the testimony of Messrs. Barke and Maxwell. Their testimony was credible for a number of reasons. They answered the questions directly and in a straightforward manner. Their testimony also was consistent with the documentary evidence. The petitioner's testimony, on the other hand, was not credible. He was evasive, rambling, and his testimony was inconsistent with logic and the documentary evidence.

James S. Maxwell, Esquire and Brian M. Barke, Esquire, were retained by Mr. Seligh in approximately March of 2003. Mr. Seligh was being investigated by the Grand Jury at that time. During the next few months, counsel discussed with Mr. Seligh the nature of the government's investigation, the petitioner's involvement in certain transactions, the sample evidence that the government provided to the lawyers in May 2003, and the possible sentence if the petitioner was convicted. Counsel also discussed with the defendant elements of the charges that the government was going to bring. The defendant appeared to understand what they were talking about. He never appeared confused about the charges.

Counsel took what the government said the charging statute was and the base offense level plus enhancements. They went to the federal sentencing guidelines manual and opened up the back cover and showed Mr. Seligh the chart. They went through the various possible offense levels with him.

Mr. Barke discussed with the defendant trial strategy. Based upon what Mr. Seligh was telling them, the lawyers were going to try to place responsibility for the rolling back of odometers and the altering of paperwork on someone related to Herson's Honda as opposed to Mr. Seligh. They were also going to question the accuracy of the paperwork that the government was submitting as evidence. Mr. Seligh did not admit or accept responsibility during the representation.

By letter dated December 8, 2003, Ms. Furman sent a letter to Mr. Barke and Mr. Maxwell transmitting a guilty plea agreement. Mr. Barke received the package around December 9, 2003. The exhibit used at the hearing was from Mr. Barke's files. Mr. Barke handed Mr. Seligh the plea agreement on Friday, December 8 (or 9). Mr. Seligh returned on December 17 and 18 and they had two separate meetings about the plea agreement.

Mr. Barke reviewed the plea agreement with the petitioner and his sentence exposure if Mr. Seligh accepted the agreement. In the agreement there are a number of different paragraphs that say what the offense level was and the enhancements for different things. The plea agreement states that if the defendant did plead guilty, the fraud loss that would be applicable to his sentence would be between $200,000 and $400,000.

Beginning at paragraph 10 of the agreement there is a paragraph that goes through the various facts that the government said it could prove. It says that there were seventy motor vehicles with rolled back odometers. Mr. Barke's understanding of how the fraud loss was calculated was that seventy vehicles were involved, with a value of $4,000.00 per vehicle which put it at $280,000 which is within that range. He discussed with Mr. Seligh the case law which would call for the $4,000 number. After discussions with Mr. Seligh, they concluded that if they looked at the actual value of the particular cars, they might be looking at a higher exposure.

The lawyers discussed relevant conduct with the petitioner. They discussed with Mr. Seligh the fact that the plea agreement had a stipulation for a four level upward adjustment for more than 50 victims. The plea agreement also had an enhancement for sophisticated means. Mr. Barke does not recall specifically whether he talked with Mr. Seligh about that section.

Mr. Barke told the petitioner that the offense level would be 24 and if he plead guilty, there would be a 3 level reduction to 21. His exposure from going to trial was offense level 24 as opposed to 21. He told him that the 24 brought 51 to 63 months and 21 brought 37 to 46 months.

After this discussion, Mr. Seligh decided that he would not plead guilty. He would not admit responsibility. Early on, Mr. Seligh talked about having the government drop the case in exchange for his paying restitution and counsel explained that this was not a possible resolution because there was no way the government was going to do that.

Mr. Barke tried to see if there were others involved in these transactions so that he could possibly package something for an off the record debriefing with the government. Mr. Seligh would not admit to any involvement so Mr. Barke was not able to get names of any other people from Mr. Seligh.

Mr. Barke reviewed various motor vehicle documents that were available in the government's office in Washington, D.C. He talked with Mr. Seligh about the different transactions that the documents represented. Mr. Barke was not confused or uncertain about the information. Mr. Barke talked with Mr. Seligh about calling witnesses to testify on his behalf. They talked about having a handwriting expert, and they retained a handwriting expert to testify. Mr. Seligh suggested Linda Ward and Peter Barrow as witnesses. Mr. Barrow was the purchaser of one of the cars in the indictment.

Mr. Barke spoke with Mr. Barrow. Mr. Barrow would have testified that when he bought the car in question, it had about 170,000 miles on it. After he bought the vehicle, Mr. Seligh

personally took Mr. Barrow to the agency to have the vehicle titled and Mr. Seligh took the title documents and presented them to the Clerk so they could be retitled. Counsel did not believe that this testimony would have offered any benefit to Mr. Seligh at trial. They learned that the government had documentary evidence that Mr. Seligh had altered a title, presented the altered title to Wyoming's authority and then had a new title issued for this car at a lower mileage rate. The lawyers concluded that if Mr. Barrow testified that he actually bought the vehicle with 170,000 miles on it and that the title Mr. Seligh had acquired from Wyoming was 70,000 or lower, then "we're dead here." They thought that Mr. Barrow would help the government's case. Counsel, therefore, called him off as a witness. Mr. Barke described his thinking to Mr. Seligh. Mr. Seligh did not agree or disagree. He just looked back at him.

Mr. Barke talked with Mr. Seligh multiple times about taking the stand. Mr. Seligh wanted to explain his view on the business of selling vehicles. He rambled and gave his opinions as to what he thought was going on in the case. It was not focused on the particular transactions at issue. Mr. Seligh never discussed with him any possible testimony that would exculpate him.

The lawyers told Mr. Seligh that testifying would create a problem for him. He would get convicted because he

would either not be honest or be evasive or convict himself by admitting responsibility. Mr. Seligh never protested.

Mr. Barke does not recall Mr. Seligh giving him the names of any people to whom he could talk about being a character witness. There was Mr. Ruger and his mother but Mr. Barke did not think that either one could be a character witness.

Mr. Barke mailed Mr. Seligh the original presentence report. They talked on the telephone about it. Mr. Seligh did not have any questions but he raised objections to the number of vehicles used in the loss calculation. Mr. Barke told him that they were relevant conduct and they were going to try to convince the Court that the Court should not use that number in making the loss calculation. He discussed the revised presentence report with Mr. Seligh. They discussed the base offense level, enhancements, loss calculation, and the viability of asking the Court not to consider the 70 vehicles in assessing the enhancement for the loss. Prior to the first date, he reviewed the report and did some research. He did call Mr. Ruger as a witness. During the continuation of the sentencing, he reviewed the victim impact statements. He also looked at the additional car files relating to the 70 cars. He talked with Mr. Seligh about the loss calculation.

Mr. Maxwell had discussions with both the government and the petitioner about the fraud loss that would be

attributable to Mr. Seligh. Mr. Maxwell had a number of discussions with the government in which he asked for a reduced amount of loss. He attempted to get the government to limit the fraud loss to the nine cars that were included in the indictment. He had these discussions both before indictment and after indictment and after the draft plea agreement was received.

Mr. Maxwell was never authorized by the defendant to negotiate a plea agreement with a lower loss, however. Mr. Seligh would not admit responsibility for the alleged crimes. Mr. Maxwell, therefore, did what he sometimes does in such situations. He suggested to the government that he would recommend and perhaps strongly recommend to Mr. Seligh a certain type of arrangement. He told the petitioner again and again that it was his strong recommendation that Mr. Seligh accept an agreement that contemplated a $4000 loss times the nine cars. The government rejected this suggestion, and Mr. Seligh's reaction to this advice was that he was not pleading guilty. He would never admit any conduct that would have been necessary for a plea. Mr. Maxwell told the defendant that the evidence appeared to him to be sufficient to convict him and that he ought to seriously consider pleading guilty, if he was in fact responsible for the conduct that was charged.

II. Discussion

Mr. Seligh contends that his trial and sentencing counsel rendered ineffective assistance. He raises a number of claims in connection with this allegation, namely that his counsel, James S. Maxwell and/or Brian M. Barke:
(1) mischaracterized the benefit of proceeding to trial, as opposed to negotiating a plea agreement, and provided a skewed estimate of the probable outcome; (2) never pursued a plea agreement on Mr. Seligh's behalf and did not present a written offer by the Government to enter into a plea; (3) did not allow Mr. Seligh the opportunity to decide whether or not to testify in his own behalf; (4) did not properly advise him about the sentencing process and was unprepared to address the loss issue at sentencing; and (5) lacked familiarity with evidence and refused to call a witness that could have been used in Mr. Seligh's defense.

A defendant has a Sixth Amendment right to "reasonably effective assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish a constitutional violation of this right a defendant has the burden of showing: (1) that counsel's performance fell well below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. At 687.

Strickland imposes a "highly demanding" standard upon a petitioner to prove the "gross incompetence" of his counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). See also Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) ("Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, we have cautioned that it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" (quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989))).

The Strickland Court held that the proper measure of attorney performance is simply reasonableness under prevailing professional norms:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland v. Washington 466 U.S. at 689 (citation omitted). Furthermore, there is a strong presumption that counsel rendered adequate assistance. Id. At 690. As with any other claim under § 2255, the burden of proving ineffectiveness assistance of counsel is on the petitioner. Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985).

Regarding a defendant's burden of establishing prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Rather, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 693-694.

The Court's findings of fact negate most of the claims made by the petitioner about his counsel. The Court will discuss each one in turn.

1. The petitioner's counsel did not mischaracterize the benefit of proceeding to trial as opposed to negotiating a plea agreement. Nor did they provide a skewed estimate of the probable outcome of the case. The Court found the lawyers credible in describing all of the discussions they had with Mr. Seligh about the nature of the government's case and its evidence as well as the possible sentence in this case. Mr. Seligh's testimony was rambling, evasive, and not entirely credible. His

demeanor on the stand seemed consistent with counsel's description of his demeanor during the pretrial stages and trial stage of this case. Mr. Seligh would never admit responsibility or guilt in this case. It would have been inappropriate for counsel to pressure him to plead guilty.

2. The petitioner's argument concerning a plea agreement is absolutely false. The government introduced into evidence at the evidentiary hearing on the petition the letter and plea agreement that it sent to counsel. Mr. Seligh admitted that he had had meetings with counsel concerning the plea agreement. Mr. Barke gave a lengthy and credible description of all of the time he spent with Mr. Seligh going over the plea agreement. Mr. Maxwell also described his substantial efforts in trying to negotiate a favorable plea agreement for the defendant. Mr. Seligh did not want to plead guilty. He wanted the government to drop the case. There was no way that that was going to happen and counsel told Mr. Seligh that. It was the petitioner's decision not to take the plea.

3. The Court rejects Mr. Seligh's claim that he was not given the opportunity to decide whether or not to testify on his own behalf. Counsel went through with him the dangers of testifying on his own behalf and strongly recommended that he not. He did not resist that suggestion. Counsel's recommendation seems eminently reasonable. Had Mr. Seligh

testified at the trial in the same way he testified at the hearing on his petition, it would have done him no good both because of his poor demeanor and because he admitted guilt as to some transactions during the hearing on the petition. Transcript, p. 61.

4. The fourth complaint is that counsel did not properly advise Mr. Seligh about sentencing and was unprepared to address the loss issue at sentencing. The Court rejects the first part of this claim. Mr. Barke credibly described the preparation and advice that he had given Mr. Seligh about sentencing. It was not ineffective. The Court was concerned that at the first sentencing hearing Mr. Barke was not prepared to address the loss issue as the Court expected. The Court, however, took care of that problem by putting off the sentence to allow Mr. Barke to review all the materials in order to prepare for sentencing. There was absolutely no prejudice to the defendant from any lack of preparation on the loss issue at the first sentencing hearing.

5. The Court finds as a fact that Mr. Barke did not lack familiarity with the evidence. The Court bases this conclusion both on the testimony at the hearing and also on the trial itself. Counsel appeared very well versed with all the evidence in the case. The Court is not convinced that Mr. Barrow or any other witness that could have been called on Mr. Seligh's

defense would have made any difference to the result. The Court accepts Mr. Barke's analysis that Mr. Barrow would have done more harm than good. Any possible character witnesses were called by the government. They were his former girlfriend and his close friend who both testified against Mr. Seligh.

An appropriate order follows.

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JAMES SELIGH	:	NO. 03-750

ORDER

AND NOW, this 29th day of June, 2005, upon consideration of petitioner's Motion to Vacate/Set Aside/Correct Sentence (Docket No. 47), the government's opposition thereto, and supplemental briefing by the petitioner and government, and a hearing on March 24, 2005, IT IS HEREBY ORDERED that said motion is DENIED. IT IS FURTHER ORDERED that a certificate of appealability is denied because the petitioner has not made a substantial showing of the denial of a constitutional right.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.